

Letter of Findings Number: 04-20110539
Sales and Use Tax
For Tax Years 2008, 2009, and 2010

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of use tax on purchased items.

II. Sales and Use Tax – Electricity Utility Exemption.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-2.5-4-5; IC § 6-2.5-5-5.1; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-13](#); Sales Tax Information Bulletin 55 (May 1989); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991) aff'd 599 N.E.2d 588 (Ind. 1992).

Taxpayer argues that it is entitled to the "predominate usage" sales tax exemption.

STATEMENT OF FACTS

Taxpayer is an Indiana company. Taxpayer is an industrial processor of other manufacturer's metal parts. As the result of a Department sales and use tax audit for the years 2008-2010, Taxpayer was assessed additional sales and use tax and interest. Taxpayer protested the assessments. Taxpayer did not request a hearing. This Letter of Findings was written based on the materials in the file. Additional facts will be provided as necessary.

DISCUSSION

I. Sales and Use Tax – Imposition.

The Department assessed use tax on Taxpayer's purchase of heat treating specification items. The auditor found that Taxpayer had not paid use tax on these items after reviewing Taxpayer's books and records, including Taxpayer's use tax accrual system and credit card statements. Taxpayer argues that tax has already been paid on these items.

Indiana imposes a sales tax on the transfer of tangible personal property in a retail transaction. IC § 6-2.5-2-1. A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

All tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer provided no documentation or other evidence to show that tax had been paid. Therefore, Taxpayer has not met its burden of proof.

FINDING

Taxpayer's protest is respectfully denied.

II. Sales and Use Tax – Electricity Utility Exemption.

The Department audited Taxpayer's use of natural gas and electricity. Taxpayer has four electric utility meters and two natural gas utility meters. One of the electric meters was determined to be used both in operations integral to Taxpayer's industrial processing and also for general usage, such as lighting. The Department found that forty-seven point five (47.5) percent of the electricity used by Taxpayer from this meter was used for an exempt purpose. Therefore, the Department assessed use tax on fifty-two point five (52.5) percent of electricity used by Taxpayer from this meter. Taxpayer believes that ninety-seven and a half (97.5) percent of the electricity used from this meter was for exempt purposes. Taxpayer argues that this factor should be used instead.

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

In accordance with IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on Indiana retail transactions unless a valid exemption is applicable. IC § 6-2.5-4-1 provides that a retail transaction involves the transfer of tangible personal property.

Indiana imposes a use tax on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2; [45 IAC 2.2-3-4](#). The sales of natural gas and electricity by a public utility are specifically defined as retail transactions subject to the sales and use taxes. IC § 6-2.5-4-5(b).

Property that is directly used in the direct production of Taxpayer's product for sale is exempt from the sales and use taxes. IC § 6-2.5-5-3(b). If the natural gas or electricity are predominately used for a purpose that is exempt from the sales and use taxes, then all of the natural gas and electricity are exempt from the sales and use taxes. IC § 6-2.5-4-5(c)(3). IC § 6-2.5-3-4(a)(2) allows for a use tax exemption for property that is acquired in a transaction that is exempt from sales tax under IC § 6-2.5-5, and the property is being stored, used, or consumed for the purpose for which it was exempted.

One of those exemptions is found at IC § 6-2.5-5-5.1, which states:

(a) As used in this section, "tangible personal property" includes electrical energy, natural or artificial gas, water, steam, and steam heat.

(b) Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture. This exemption includes transactions involving acquisitions of tangible personal property used in commercial printing.

Also, [45 IAC 2.2-4-13](#) explains:

(a) In general, the furnishing of electricity, gas, water, steam, or steam heating services by public utilities to consumers is subject to tax.

(b) The gross receipt of every person engaged as a power subsidiary or a public utility derived from selling electrical energy gas, water, or steam to consumers for direct use in direct manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, horticulture, or another public utility or power subsidiary described in [IC 6-2.5-4-5](#) shall not constitute gross retail income of a retail merchant received from a retail transaction. Electrical energy, gas, water, or steam will only be considered directly used in direct production, manufacturing, mining, refining, oil or mineral extraction, irrigation, agriculture, or horticulture if the utilities would be exempt under [IC 6-2.5-5-5.1](#).

(c) Sales of public utility services or commodities to consumers engaged in manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, horticulture, or another public utility or power subsidiary described in [IC 6-2.5-4-5](#), based on a single meter charge, flat rate charge, or other charge, are excepted if such services are separately metered or billed and will be used predominantly for the excepted purposes.

(d) Sales of public utility services and commodities to consumers engaged in manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, or horticulture, based on a single meter charge, flat rate charge, or other charge, which will be used for both excepted and nonexcepted purposes are taxable unless such services and commodities are used predominantly for excepted purposes.

(e) **Where public utility services are sold from a single meter and the services or commodities are utilized for both exempt and nonexempt uses, the entire gross receipts will be subject to tax unless the services or commodities are used predominantly for excepted purposes. Predominant use shall mean that more than fifty percent (50[percent]) of the utility services and commodities are consumed for excepted uses.**

(Emphasis added.)

The taxpayer claiming exemption has the burden of showing the terms of the exemption statute are met. *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991) aff'd 599 N.E.2d 588 (Ind. 1992) (Internal citations omitted). Additionally "[e]xemption statutes are strictly construed because an exemption releases property from the obligation of bearing its fair share of the cost of government." *Id.*

Finally, Sales Tax Information Bulletin 55 (May 31, 1989 (Revised)), 12 Ind. Reg. 2431, provides in relevant part:

Any user who does not meet the predominate use test and industrial processors may still qualify for partial exemption under [IC 6-2.5-5.1](#) for utilities that are directly consumed by the purchaser in the direct production of tangible personal property in the purchaser's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture.... All sales tax must first be paid to the utility and a claim for refund with documentation submitted to the department on a calendar year basis. **(Emphasis added).**

Taxpayer is an industrial processor. If over fifty percent of Taxpayer's electricity and natural gas usage is for the exempt purpose, then Taxpayer's total utility usage is exempt from the sales and use taxes.

The Department conducted an audit of Taxpayer's electricity usage from the mixed usage meter. The Department listed the items used in 2010 in industrial processing connected to the meter in question that used electricity. The kWh/year for these items was totaled, and then that amount was divided by the total electricity consumed from this meter in 2010. From this information the electricity used in industrial processing was calculated at forty-seven point five (47.5) percent from this meter. Therefore, the Department assessed use tax on fifty-two point five (52.5) percent of Taxpayer's electricity from this meter.

Taxpayer's representative claims that 52.5 percent is much too large, finding the factor to be no more than

2.5 percent. Taxpayer provided no information to substantiate this claim, merely pointing out that lighting was not included amongst the items used in industrial processing. However, lighting is not an integral part of industrial processing. As Sales Tax Information Bulletin 55 (May 31, 1989 (Revised)) explains, "Utilities used for... general lighting (including security lighting)... [is] taxable." Taxpayer has not met its burden to show that the Department's audit's determination is incorrect.

FINDING

Taxpayer's protest is respectfully denied.

CONCLUSION

Taxpayer's protest is respectfully denied.

Posted: 04/25/2012 by Legislative Services Agency

An [html](#) version of this document.